

May 16, 2006

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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ORDER ON RECONSIDERATION

SUBJECT: Department of Development and Environmental Services File No. **L04CU031**

ALL PETS GO TO HEAVEN, LLC
Conditional Use Appeal

Location: 35022 Southeast Fall City Snoqualmie Road

Appellant: All Pets Go To Heaven, LLC
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1. On April 14, 2006 King County DDES filed a motion for reconsideration of portions of the examiner's April 3, 2006 report and decision. The DDES motion focuses on two matters. The first concerns the manner in which further review of traffic impacts should be required prior to a final permitting decision and the second is whether adequate review of Comprehensive Plan policies was provided with the April 3, 2006 report and decision in the manner required by KCC 21A.44.040 H. A notice of reconsideration issued on April 17, 2006 noted the likelihood that further conclusions would be required regarding Comprehensive Plan policy compliance. Both DDES and the Appellant's attorney Scott Missall have submitted briefing in response to the notice of reconsideration.
2. It is the examiner's view that whatever revisions need to be made to the April 3, 2006 report and decision should be implemented without remanding the matter back to DDES and necessitating further hearing time to be expended. Despite the high level legal discussion, this remains at bottom a very small permit application that deserves to be processed without undue delay and expense. The revised conditions attached to this order allow for this to occur, but also provide an option for reopening the hearing record if the fundamental assumptions underlying the decision prove to be infeasible. We agree with DDES that the All Pets traffic concurrency certificate

needs to be revised to include the greater level of traffic activity implicit in the creation of an espresso stand that accommodates drive-by customers. Our expectation is that issuance of a revised concurrency certificate should be a fairly routine matter, but we are also aware that when dealing with the traffic concurrency black box nothing can be taken for granted.

3. As memorialized within finding no. 8 of the April 3, 2006 decision, hearing testimony was offered to the effect that WSDOT had determined that the permanent espresso stand location should be set back 80 feet from SR 202. Unfortunately, the document that purports to establish this WSDOT requirement was not found within the DDES file. Nonetheless, the conditions of approval can be revised to specify that the espresso stand setback shall be determined at building permit review based on WSDOT requirements and any further analysis contained in a site-specific traffic study and access review. Until this further traffic review is completed, the travel trailer that currently houses the espresso stand may remain in its current location pending determination of where a permanent facility should be located. Condition no. 4 B. has been revised to tie the phasing out of the travel trailer to the process of approving a permanent site.
4. Additional conclusions have been provided below which implement the requirements of KCC 21A.44.040 H.

ORDER:

The April 3, 2006 report and decision is revised on reconsideration as follows:

A. The following new conclusions are incorporated:

16. KCC 21A.44.040 H requires a conditional use applicant to demonstrate that “the conditional use is not in conflict with the policies of the comprehensive plan or the basic purposes” of Title 21A. There has been debate among the parties as to whether this provision adds anything of substance to the code section. The DDES brief submitted on May 2, 2006 offers the following discussion which appears to be generally appropriate:

“In the specific case, the espresso stand use is only permitted as a home industry through the conditional use permit approval process. The use must meet the requirements of KCC 21A.30.090 relating to home industry, the requirements of KCC 21A.44.040 relating to conditional use permits, and as a non-residential use in a residential zone, the requirements of KCC 21A.12.220. ...the code standards are generally compatibility standards related to size, intensity of use, appearance both visually and from an impact analysis (lighting) standpoint, design and location. As long as a use is designed in such a way as to be compatible under these standards the use is permitted in the zone.

“Generally, the analysis would stop at this point, particularly in the instance where the CUP analysis is for a use that is specifically called out in the permitted use table, such as the pet cemetery. In that case, there has been a preliminary policy determination by the act of adopting the code that the use is appropriate in the zone. The CUP review process is more focused on making sure the use met the code standards and the compatibility or design standards in the comprehensive plan.

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“However, with the new addition of the CUP criteria that the use is not in “conflict” with the policies of the comprehensive plan policies (sic), there will be some instances when the use itself must be evaluated for appropriateness at the location proposed. Comprehensive plan policies may address general compatibility issues that can be resolved by design, but there may be instances where, due to the location, operation or intensity of the use, the use itself will be in conflict with a comprehensive plan policy.”

17. Questions concerning the regulatory effect of comprehensive plans have long been a topic of controversy in the State of Washington. The general rule is that a comprehensive plan standing alone has no regulatory effect but a local jurisdiction may act to specifically incorporate comprehensive plan policies as regulatory requirements. When that happens a comprehensive plan may be given regulatory effect but only to the extent that such plan policies do not conflict with specific zoning code requirements. The recent court of appeals decision in *Cingular Wireless v. Thurston County* (2006 App. slip-32967-1-II) provides a detailed exposition of this relationship and distinguishes the appropriate use of comprehensive plan policies from those applications that were deemed inappropriate in *Lakeside Industries v. Thurston County*, 119 Wn. App. 886 (2004).

“The circumstances before us differ from those in *Lakeside* because here the hearing examiner found that the proposed use would have specific adverse effects and, thus, did not meet both the general and specific requirements. . . .

“Further, in *Lakeside*, the county board failed to identify any factual findings in support of its decision. Instead, the hearing examiner’s findings indicated that the project met all relevant zoning code provisions, both general and specific. The situation differs here. The hearing examiner’s findings identify specific adverse effects on the neighborhood character. Based on those findings, the board affirmed the hearing examiner. The board noted that a community recreational area was just 150 feet from the site, the WCF would create “visual pollution” in the adjacent Cushman area neighborhood and obstruct the neighborhood’s Mount Rainier view corridor, a number of significant trees would be removed, and the WCF would “have a looming presence over the adjacent community area that historically has been used for recreational community purposes.”

“Unlike in *Lakeside*, here the county board’s decision was consistent with the facts found by the hearing examiner and grounded in a factually specific consideration of the suitability of the particular site for the proposed project.”

18. Our conclusion is that the espresso stand proposed by All Pets does not conflict with King County Comprehensive Plan policies when evaluated in the fact-sensitive context required by the *Cingular* decision. Our disagreement with the DDES analysis lies primarily with staff’s continuing insistence on framing the issues in absolute generic terms. Thus staff’s April 14, 2006 motion for reconsideration declares categorically that “a drive-through espresso stand is an urban retail activity;” the May 2, 2006 briefing memo describes the basic issue as “whether a drive-through espresso stand is compatible with the rural character of the neighborhood;” and staff’s motion summary characterizes

the problem as one of “placing an urban retail sales structure in full visibility from the rural road dominated by views of the rural land and the adjacent river.”

The reality is, however, that not only will the espresso stand not be visible from any neighboring residential properties, but that drivers along SR 202 who view the espresso stand to the north will necessarily see it within the context of the house and other outbuildings at the All Pets property. Those drivers who prefer to look at the rural land and river to the south will not encounter the espresso stand interfering with their viewscape. In short, even if one assumes that drivers on the state route possess some cognizable interest within the conditional use permit process in preserving rural views the actual visual impact of the espresso stand is that of a small structure located on a developed residential property.

19. Turning to the specific Comprehensive Plan policies themselves, the espresso stand proposed by All Pets on the existing residential property does not conflict with adopted policies for the Rural Area. Policy R-221 states five alternative bases for siting non-residential uses in the Rural Area, and All Pets can meet two of them. The coffee stand will provide a convenient local service for nearby residents and it comprises a component in the adaptive re-use of a historic homestead site. Looking at the assemblage of different uses within the All Pets proposal, it is clear that the Appellant does not expect to be able to create a financially viable business enterprise based on any one element of the mixture. Rather, it is a matter of blending together complementary business components in the hopes of generating overall sufficient customer activity to achieve success. The espresso stand is a piece of this puzzle and therefore contributes to the adaptive reuse of the historic structures. In like manner, with respect to policy R-101 the espresso stand assists in protecting and enhancing historical resources and historical character, supports locally owned small businesses and provides business uses of a size and scale that blend with traditional rural development. Overall, and within the specific context proposed by the Appellant, the espresso stand does not conflict with Comprehensive Plan policies. Finally, since animals are still permitted to exist in selected portions of the King County Rural Area, there is no argument that the animal services provided by the remainder of the All Pets business operations fail to meet Rural policies within the Comprehensive Plan.
- B. Conclusion nos. 13, 14 and 15 within the April 3, 2006 report and decision are renumbered as 20, 21 and 22.
- C. The conditional use permit conditions stated within the April 3, 2006 report and decision are revised as follows:
 1. Development shall be generally in accordance with the CUP application and the revised site plan received September 28, 2005, except as otherwise provided herein.
 2. A complete application for a building permit (for change of use and cemetery structure additions) shall be submitted within twelve (12) months of the transmittal date of this reconsidered decision. Otherwise, this conditional use approval shall become null and void. For purposes of this condition a complete application does not require issuance of the revised traffic concurrency certificate authorized below in condition 3 C.

3.
 - A. At the time of building permit application the proposal shall be subject to a detailed drainage and structural review for compliance with the King County Storm Water Design Manual, International Building Code and fire requirements. At such time a traffic impact assessment and entering sight distance and stacking space analysis for the access driveway shall also be required for vehicle traffic generated by the home industry espresso and food sales activities.
 - B. The travel trailer now being operated for espresso sales may remain in its current location until the updated traffic review has been completed and the required road setback determined; provided that, the trailer may be relocated pending traffic review to another place on the property that is set at least as far back from SR 202 as the current location. Based on the updated traffic review and any applicable WSDOT requirements, DDES shall approve a vehicle circulation plan and road setback requirement for a permanent espresso stand.
 - C. As part of its traffic impact review DDES may require the Applicant to obtain a revised traffic concurrency certificate that accurately reflects the espresso stand use. If a revised transportation certificate is denied to the Applicant for the espresso stand use (and after available administrative appeals have been exhausted), the public hearing will be reopened by the examiner upon the request of either DDES or the Applicant to revise the conditional use permit to reflect the changed regulatory assumptions.
4. The following special conditions shall apply to the operation of the home industry espresso coffee and food catering business:
 - A. The total area devoted to the espresso sales and food catering home industry use shall not exceed 50% of the floor area of the dwelling unit, as reviewed and approved by DDES. Outside seating areas adjacent to food or beverage services shall be computed as part of the home industry use.
 - B. The existing Silver Streak espresso sales trailer does not qualify as a home industry structure and shall be phased out no later than six months after issuance of the building permit required by condition 2 above, or by December 31, 2006, whichever occurs later.
 - C. Consistent with KCC 21A.20.080A, only one non-illuminated wall sign not exceeding six square feet in area shall be permitted for the home industry use.
 - D. Future buildings or structures to be used for the operation of the espresso and food catering business shall adhere to a minimum setback of 30 feet from all exterior property lines; provided that, a greater setback from SR 202 may be required based on the building permit traffic review and/or WSDOT requirements.
 - E. Ten feet of Type I landscaping shall be required along those portions of the business that are visible from SR 202 and neighboring parcels.

- F. The espresso coffee drinks and food catering business shall at all times fully comply with KCC 21A.30.090, home industry. Sales shall be limited to items produced on-site.
5. The following special conditions shall apply to the existing dog training and pet warm water therapy pool:
- A. On site sales of pet supplies and products shall be limited to those products exclusively for the training and rehabilitation of injured dogs.
 - B. Spa and therapeutic treatment (massages, warm water therapy, acupuncture, general spa activities, etc.) services shall be allowed for pets only.
 - C. Spa activities shall at all times comply with the health regulations of the State of Washington and King County.
 - D. Any on site advertising of the dog training and pet warm water therapy pool business shall fully comply with King County Chapter KCC 21A.20, Development Standards – Signs.
6. The following special conditions shall apply to the proposed pet cemetery:
- A. All pet cemetery structures (including the “wall of honor”) shall be set back a minimum of 100 feet from all exterior boundaries adjoining residential properties. For purposes of this requirement SR 202 is considered an unclassified property.
 - B. On-site cremation of animals is not allowed.
 - C. On-site sales of pet burial products (urns, ossuaries, caskets, etc.) shall be allowed only for the patrons of the pet cemetery operation.
 - D. Scattering remains and the burial of non-cremated animal carcasses shall not be allowed within the Class 2 stream and 50-foot Class 2 sensitive area stream buffer located along the southeastern edge of the subject parcel.
 - E. Any on site advertising for the pet cemetery business shall comply with King County Chapter KCC 21A.20 Development Standards – Signs.
7. The following special conditions shall apply to home occupation sales of pet supplies:
- A. Selling of general pet supplies is allowed as home occupation and shall at all times comply with KCC 21A.30.080 herein.
 - B. Sales are limited to mail order, internet, and telephone sales for off-site delivery of products. No drive up sales are permitted.
8. The site shall be operated at all times in compliance with the conditions contained herein and only for approved uses. Failure to maintain compliance with said conditions may be

cause for King County DDES to institute a code enforcement action and/or revocation of issued permits and authorizations as provided by KCC 21A.50.040.

9. Daily hours for all businesses shall be 6:00 a.m. – 10:00 p.m.
10. All exterior lighting shall be directed so that lights will not reflect onto neighboring parcels and vehicles traveling along SR 202.
11. The hearing examiner shall retain jurisdiction over this proceeding to determine the future necessity of revising conditions pertaining to the espresso stand use. Either DDES or the Applicant may request that the hearing be reopened if the espresso stand use authorized by this permit becomes infeasible due to the inability of the Applicant to obtain a revised transportation concurrency certificate, or for review of any other traffic-related issue if after 36 months from the date of this revised decision DDES has not issued a building permit to the Applicant as specified within condition no. 2. Upon issuance of the building permit specified in condition no. 2 hearing examiner jurisdiction shall terminate.

ORDERED this 16th day of May, 2006.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 16th day of May, 2006, to the following parties and interested persons of record:

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